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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ONLINE MERCHANTS GUILD,

Plaintiff,

v.

**NICOLAS MADUROS, DIRECTOR,
CALIFORNIA DEPARTMENT OF TAX
& FEE ADMINISTRATION,**

Defendant.

No. 2:20-cv-01952-MCE-DB

**STIPULATED PROTECTIVE ORDER
GOVERNING DISCLOSURE OF
CONFIDENTIAL INFORMATION**

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. In particular, this action relates to California state taxes, and California law prohibits the disclosure of certain taxpayer information. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order, which is based on the Model Protective Order of the United States District Court for the

Northern District of California. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 12.3, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 141 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as their support staff).

2.4 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL."

2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action.

2.7 House Counsel: attorneys who are employees of a party to this action. House Counsel includes attorneys employed by the California Department of Tax and

1 Fee Administration and does not include Outside Counsel of Record, attorneys
2 employed by the California Department of Justice, or any other outside counsel.

3 2.8 Non-Party: any natural person, partnership, corporation, association, or other
4 legal entity not named as a Party to this action.

5 2.9 Outside Counsel of Record: attorneys who are not employees of a party to
6 this action but are retained to represent or advise a party to this action and have
7 appeared in this action on behalf of that party or are affiliated with a law firm or which
8 has appeared on behalf of that party or with the California Department of Justice.

9 2.10 Party: any party to this action, including all of its officers, directors,
10 employees, consultants, retained experts, and Outside Counsel of Record (and their
11 support staffs).

12 2.11 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
13 Material in this action.

14 2.12 Professional Vendors: persons or entities that provide litigation support
15 services (e.g., photocopying, videotaping, translating, preparing exhibits or
16 demonstrations, and organizing, storing, or retrieving data in any form or medium) and
17 their employees and subcontractors.

18 2.13 Protected Material: any Disclosure or Discovery Material that is designated
19 as "CONFIDENTIAL."

20 2.14 Receiving Party: a Party that receives Disclosure or Discovery Material from
21 a Producing Party.

22 3. SCOPE

23 The protections conferred by this Stipulation and Order cover not only Protected
24 Material (as defined above), but also (1) any information copied or extracted from
25 Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected
26 Material; and (3) any testimony, conversations, or presentations by Parties or their
27 Counsel that might reveal Protected Material. However, the protections conferred by this
28 Stipulation and Order do not cover the following information: (a) any information that is in

1 the public domain at the time of disclosure to a Receiving Party or becomes part of the
2 public domain after its disclosure to a Receiving Party as a result of publication not
3 involving a violation of this Order, including becoming part of the public record through
4 trial or otherwise; and (b) any information known to the Receiving Party prior to the
5 disclosure or obtained by the Receiving Party after the disclosure from a source who
6 obtained the information lawfully and under no obligation of confidentiality to the
7 Designating Party. Any use of Protected Material at trial shall be governed by a separate
8 agreement or order.

9 4. DURATION

10 Even after final disposition of this litigation, the confidentiality obligations imposed
11 by this Order shall remain in effect until a Designating Party agrees otherwise in writing
12 or a court order otherwise directs. Final disposition shall be deemed to be the later of
13 (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2)
14 final judgment herein after the completion and exhaustion of all appeals, rehearings,
15 remands, trials, or reviews of this action, including the time limits for filing any motions or
16 applications for extension of time pursuant to applicable law.

17 5. DESIGNATING PROTECTED MATERIAL

18 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
19 Party or Non-Party that designates information or items for protection under this Order
20 must take care to limit any such designation to specific material that qualifies under the
21 appropriate standards. The Designating Party must designate for protection only those
22 parts of material, documents, items, or oral or written communications that qualify – so
23 that other portions of the material, documents, items, or communications for which
24 protection is not warranted are not swept unjustifiably within the ambit of this Order.

25 Mass, indiscriminate, or routinized designations are prohibited. Designations that
26 are shown to be clearly unjustified or that have been made for an improper purpose
27 (e.g., to unnecessarily encumber or retard the case development process or to impose
28

unnecessary expenses and burdens on other parties) expose the Designating Party to sanctions.

If it comes to a Designating Party's attention that information or items that it designated for protection do not qualify for protection, that Designating Party must promptly notify all other Parties that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) for information in documentary form (e.g., paper or electronic documents, but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend "CONFIDENTIAL" to each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

A Party or Non-Party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order. Then, before producing the specified documents, the Producing Party must affix the "CONFIDENTIAL" legend to each page that contains Protected Material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

1 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
2 Designating Party identify on the record, before the close of the deposition, hearing, or
3 other proceeding, all protected testimony.

4 (c) for information produced in some form other than documentary and for any
5 other tangible items, that the Producing Party affix in a prominent place on the exterior of
6 the container or containers in which the information or item is stored the legend
7 "CONFIDENTIAL." If only a portion or portions of the information or item warrant
8 protection, the Producing Party, to the extent practicable, shall identify the protected
9 portion(s).

10 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
11 designate qualified information or items does not, standing alone, waive the Designating
12 Party's right to secure protection under this Order for such material. Upon timely
13 correction of a designation, the Receiving Party must make reasonable efforts to assure
14 that the material is treated in accordance with the provisions of this Order.

15 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

16 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation
17 of confidentiality at any time. Unless a prompt challenge to a Designating Party's
18 confidentiality designation is necessary to avoid foreseeable, substantial unfairness,
19 unnecessary economic burdens, or a significant disruption or delay of the litigation, a
20 Party does not waive its right to challenge a confidentiality designation by electing not to
21 mount a challenge promptly after the original designation is disclosed.

22 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution
23 process by providing written notice of each designation it is challenging and describing
24 the basis for each challenge. To avoid ambiguity as to whether a challenge has been
25 made, the written notice must recite that the challenge to confidentiality is being made in
26 accordance with this specific paragraph of the Protective Order. The parties shall
27 attempt to resolve each challenge in good faith and must begin the process by
28 conferring directly (in voice to voice dialogue; other forms of communication are not

1 sufficient) within 14 days of the date of service of notice. In conferring, the Challenging
2 Party must explain the basis for its belief that the confidentiality designation was not
3 proper and must give the Designating Party an opportunity to review the designated
4 material, to reconsider the circumstances, and, if no change in designation is offered, to
5 explain the basis for the chosen designation. A Challenging Party may proceed to the
6 next stage of the challenge process only if it has engaged in this meet and confer
7 process first or establishes that the Designating Party is unwilling to participate in the
8 meet and confer process in a timely manner.

9 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
10 intervention, the Designating Party shall file and serve a motion to retain confidentiality
11 under Civil Local Rule 141.1 within 21 days of the initial notice of challenge or within
12 14 days of the parties agreeing that the meet and confer process will not resolve their
13 dispute, whichever is earlier. Each such motion must be accompanied by a competent
14 declaration affirming that the movant has complied with the meet and confer
15 requirements imposed in the preceding paragraph. Failure by the Designating Party to
16 make such a motion including the required declaration within 21 days (or 14 days, if
17 applicable) shall automatically waive the confidentiality designation for each challenged
18 designation. In addition, the Challenging Party may file a motion challenging a
19 confidentiality designation at any time if there is good cause for doing so, including a
20 challenge to the designation of a deposition transcript or any portions thereof. Any
21 motion brought pursuant to this provision must be accompanied by a competent
22 declaration affirming that the movant has complied with the meet and confer
23 requirements imposed by the preceding paragraph.

24 The burden of persuasion in any such challenge proceeding shall be on the
25 Designating Party. Frivolous challenges, and those made for an improper purpose
26 (e.g., to harass or impose unnecessary expenses and burdens on other parties) may
27 expose the Challenging Party to sanctions. Unless the Designating Party has waived the
28 confidentiality designation by failing to file a motion to retain confidentiality as described

1 above, all parties shall continue to afford the material in question the level of protection
2 to which it is entitled under the Producing Party's designation until the court rules on the
3 challenge.

4 7. ACCESS TO AND USE OF PROTECTED MATERIAL

5 7.1 Basic Principles. A Receiving Party may use Protected Material that is
6 disclosed or produced by another Party or by a Non-Party in connection with this case
7 only for prosecuting, defending, or attempting to settle this litigation. Such Protected
8 Material may be disclosed only to the categories of persons and under the conditions
9 described in this Order. When the litigation has been terminated, a Receiving Party must
10 comply with the provisions of section 13 below (FINAL DISPOSITION).

11 Protected Material must be stored and maintained by a Receiving Party at a
12 location and in a secure manner that ensures that access is limited to the persons
13 authorized under this Order.

14 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
15 ordered by the court or permitted in writing by the Designating Party, a Receiving Party
16 may disclose any information or item designated "CONFIDENTIAL" only to:

17 (a) the Receiving Party's Outside Counsel of Record in this action, as well as
18 employees of said Outside Counsel of Record to whom it is reasonably necessary to
19 disclose the information for this litigation and who have signed the "Acknowledgment
20 and Agreement to Be Bound" that is attached hereto as Exhibit A;

21 (b) the officers, directors, and employees (including House Counsel) of the
22 Receiving Party to whom disclosure is reasonably necessary for this litigation and who
23 have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

24 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
25 reasonably necessary for this litigation and who have signed the "Acknowledgment and
26 Agreement to Be Bound" (Exhibit A);

27 (d) the court and its personnel;
28

(e) court reporters and their staff, professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order.

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party must:

(a) promptly notify in writing the Designating Party. Such notification shall include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL” before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The

1 Designating Party shall bear the burden and expense of seeking protection in that court
2 of its confidential material – and nothing in these provisions should be construed as
3 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive
4 from another court.

5 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED
6 IN THIS LITIGATION

7 (a) The terms of this Order are applicable to information produced by a Non-Party
8 in this action and designated as “CONFIDENTIAL.” Such information produced by Non-
9 Parties in connection with this litigation is protected by the remedies and relief provided
10 by this Order. Nothing in these provisions should be construed as prohibiting a Non-
11 Party from seeking additional protections.

12 (b) In the event that a Party is required, by a valid discovery request, to produce a
13 Non-Party’s confidential information in its possession, and the Party is subject to an
14 agreement with the Non-Party not to produce the Non-Party’s confidential information,
15 then the Party shall:

16 (1) promptly notify in writing the Requesting Party and the Non-Party that some or
17 all of the information requested is subject to a confidentiality agreement with a Non-
18 Party;

19 (2) promptly provide the Non-Party with a copy of the Stipulated Protective Order
20 in this litigation, the relevant discovery request(s), and a reasonably specific description
21 of the information requested; and

22 (3) make the information requested available for inspection by the Non-Party.

23 (c) If the Non-Party fails to object or seek a protective order from this court within
24 14 days of receiving the notice and accompanying information, the Receiving Party may
25 produce the Non-Party’s confidential information responsive to the discovery request. If
26 the Non-Party timely seeks a protective order, the Receiving Party shall not produce any
27 information in its possession or control that is subject to the confidentiality agreement
28 with the Non-Party before a determination by the court. Absent a court order to the

1 contrary, the Non-Party shall bear the burden and expense of seeking protection in this
2 court of its Protected Material.

3 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

4 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
5 Protected Material to any person or in any circumstance not authorized under this
6 Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing
7 the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve
8 all unauthorized copies of the Protected Material, (c) inform the person or persons to
9 whom unauthorized disclosures were made of all the terms of this Order, and (d) request
10 such person or persons to execute the "Acknowledgment and Agreement to Be Bound"
11 that is attached hereto as Exhibit A.

12 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
13 PROTECTED MATERIAL

14 When a Producing Party gives notice to Receiving Parties that certain inadvertently
15 produced material is subject to a claim of privilege or other protection, the obligations of
16 the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B).
17 This provision is not intended to modify whatever procedure may be established in an e-
18 discovery order that provides for production without prior privilege review. Pursuant to
19 Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on
20 the effect of disclosure of a communication or information covered by the attorney-client
21 privilege or work product protection, the parties may incorporate their agreement in the
22 stipulated protective order submitted to the court.

23 12. MISCELLANEOUS

24 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person
25 to seek its modification by the court in the future.

26 12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective
27 Order no Party waives any right it otherwise would have to object to disclosing or
28 producing any information or item on any ground not addressed in this Stipulated

1 Protective Order. Similarly, no Party waives any right to object on any ground to use in
2 evidence of any of the material covered by this Protective Order.

3 12.3 Filing Protected Material. Without written permission from the Designating
4 Party or a court order secured after appropriate notice to all interested persons, a Party
5 may not file in the public record in this action any Protected Material. A Party that seeks
6 to file under seal any Protected Material must comply with Civil Local Rule 141.
7 Protected Material may only be filed under seal pursuant to a court order authorizing the
8 sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 141, a
9 sealing order will issue only upon a request establishing that the Protected Material at
10 issue is privileged, protectable as a trade secret, or otherwise entitled to protection under
11 the law. If a Receiving Party's request to file Protected Material under seal pursuant to
12 Civil Local Rule 141 is denied by the court, then the Receiving Party may file the
13 information in the public record unless otherwise instructed by the court.

14 13. FINAL DISPOSITION

15 Within 60 days after the final disposition of this action, as defined in paragraph 4,
16 each Receiving Party must return all Protected Material to the Producing Party or
17 destroy such material. As used in this subdivision, "all Protected Material" includes all
18 copies, abstracts, compilations, summaries, and any other format reproducing or
19 capturing any of the Protected Material. Whether the Protected Material is returned or
20 destroyed, the Receiving Party must submit a written certification to the Producing Party
21 (and, if not the same person or entity, to the Designating Party) by the 60 day deadline
22 that (1) identifies (by category, where appropriate) all the Protected Material that was
23 returned or destroyed and (2) affirms that the Receiving Party has not retained any
24 copies, abstracts, compilations, summaries or any other format reproducing or capturing
25 any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
26 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing
27 transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert
28 reports, attorney work product, and consultant and expert work product, even if such

1 materials contain Protected Material. Any such archival copies that contain or constitute
2 Protected Material remain subject to this Protective Order as set forth in Section 4
3 (DURATION).

4 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

5
6
7 Dated: March 1, 2021

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MOLLY K. MOSLEY
Supervising Deputy Attorney General

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10 By: /s/ Michael Sapoznikow
MICHAEL SAPOZNIKOW
Deputy Attorney General

11
12 *Attorneys for Defendant Nicolas*
13 *Maduros, Director, California Department*
of Tax and Fee Administration

14
15 Dated: March 1, 2021

Respectfully Submitted

16 By: /s/ Aaron K. Block
AARON K. BLOCK
The Block Firm
(as authorized via email on
17 February 25, 2021)

18
19 *Attorney for Plaintiff*
Online Merchants Guild

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21 **ORDER**

22 Pursuant to the parties' stipulation, IT IS SO ORDERED.

23 IT IS FURTHER ORDERED THAT:

24 1. Requests to seal documents shall be made by motion before the same judge who will
25 decide the matter related to that request to seal.

26 2. The designation of documents (including transcripts of testimony) as confidential
27 pursuant to this order does not automatically entitle the parties to file such a document with the
28 court under seal. Parties are advised that any request to seal documents in this district is governed

1 by Local Rule 141. In brief, Local Rule 141 provides that documents may only be sealed by a
 2 written order of the court after a specific request to seal has been made. L.R. 141(a). However, a
 3 mere request to seal is not enough under the local rules. In particular, Local Rule 141(b) requires
 4 that “[t]he ‘Request to Seal Documents’ shall set forth the statutory or other authority for sealing,
 5 the requested duration, the identity, by name or category, of persons to be permitted access to the
 6 document, and all relevant information.” L.R. 141(b).

7 3. A request to seal material must normally meet the high threshold of showing that
 8 “compelling reasons” support secrecy; however, where the material is, at most, “tangentially
 9 related” to the merits of a case, the request to seal may be granted on a showing of “good cause.”
 10 Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096-1102 (9th Cir. 2016); Kamakana
 11 v. City and County of Honolulu, 447 F.3d 1172, 1178-80 (9th Cir. 2006).

12 4. Nothing in this order shall limit the testimony of parties or non-parties, or the use of
 13 certain documents, at any court hearing or trial – such determinations will only be made by the
 14 court at the hearing or trial, or upon an appropriate motion.

15 5. With respect to motions regarding any disputes concerning this protective order which
 16 the parties cannot informally resolve, the parties shall follow the procedures outlined in Local Rule
 17 251. Absent a showing of good cause, the court will not hear discovery disputes on an ex parte
 18 basis or on shortened time.

19 6. The parties may not modify the terms of this Protective Order without the court’s
 20 approval. If the parties agree to a potential modification, they shall submit a stipulation and
 21 proposed order for the court’s consideration.

22 7. Pursuant to Local Rule 141.1(f), the court will not retain jurisdiction over enforcement
 23 of the terms of this Protective Order after the action is terminated.

24 8. Any provision in the parties’ stipulation that is in conflict with anything in this order is
 25 hereby DISAPPROVED.

26 DATED: March 1, 2021

/s/ DEBORAH BARNES
 UNITED STATES MAGISTRATE JUDGE

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of perjury that I
have read in its entirety and understand the Stipulated Protective Order that was issued
by the United States District Court for the Northern District of California on
_____ [date] in the case of Online Merchants Guild v. Maduros, Eastern
District of California Case No. 2:20-cv-01952-MCE-DB. I agree to comply with and to be
bound by all the terms of this Stipulated Protective Order and I understand and
acknowledge that failure to so comply could expose me to sanctions and punishment in
the nature of contempt. I solemnly promise that I will not disclose in any manner any
information or item that is subject to this Stipulated Protective Order to any person or
entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Eastern District of California for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this
action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and
telephone number] as my California agent for service of process in connection with this
action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____